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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 KATINA MCDADE,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

12 Defendant.

Case No. C17-335-RSM

**ORDER ON SOCIAL SECURITY  
DISABILITY**

13 **I. INTRODUCTION**

14 Katina McDade seeks review of the denial of her application for Supplemental Security  
15 Income (SSI). Ms. McDade contends the administrative law judge (ALJ) erred in evaluating: (1)  
16 the medical opinion evidence; (2) her own symptom testimony; and (3) the lay witness evidence.  
17 Dkt. 9 at 1. As discussed below, the Court **REVERSES** the Commissioner's final decision and  
18 **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. §  
19 405(g).

20 **II. BACKGROUND**

21 On September 30, 2013, Ms. McDade applied for benefits, alleging disability as of  
22 January 1, 2011. Tr. 22, 165-70. Ms. McDade's application was denied initially and on  
23 reconsideration. Tr. 22, 65-109. The ALJ conducted a hearing on April 15, 2015, at which time,

1 based on the ALJ's inquiry, Ms. McDade amended the alleged onset date to the application filing  
2 date of September 30, 2013. Tr. 26, 63. On June 22, 2015, the ALJ issued a decision finding  
3 Ms. McDade not disabled. Tr. 22-33.

### 4 III. THE ALJ'S DECISION

5 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ found:

6 **Step one:** Ms. McDade has not engaged in substantial gainful activity since September  
7 30, 2013, the amended alleged onset date and application date.

8 **Step two:** Ms. McDade has the following severe impairments: status post lymphoma,  
9 degenerative disc disease, asthma, fibromyalgia, migraine, obesity, depressive disorder,  
10 and substance abuse.

11 **Step three:** These impairments do not meet or equal the requirements of a listed  
12 impairment.<sup>2</sup>

13 **Residual Functional Capacity (RFC):** Ms. McDade can perform light work with  
14 additional limitations. She can lift and carry 20 pounds occasionally and 10 pounds  
15 frequently, stand and walk about 6 hours in an 8-hour workday, and sit about 6 hours in  
16 an 8-hour workday. She retains the mental capability to adequately perform the mental  
17 activities generally required by competitive, remunerative work: she can perform simple,  
18 routine tasks and follow short, simple instructions, do work that needs little or no  
19 judgment, perform simple duties that can be learned on the job in a short period of less  
20 than thirty days, respond appropriately to supervision and coworkers, and deal with  
21 occasional changes in the work environment. She has no difficulty dealing with the  
22 public.

23 **Step four:** Ms. McDade cannot perform past relevant work.

**Step five:** As there are jobs that exist in significant numbers in the national economy that  
Ms. McDade can perform, including office helper, electronics accessory assembler, and  
housekeeper, she is not disabled.

Tr. 22-33. The Appeals Council denied Ms. McDade's request for review making the ALJ's  
decision the Commissioner's final decision. Tr. 1-9.<sup>3</sup>

### IV. DISCUSSION

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<sup>1</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P. Appendix 1.

<sup>3</sup> The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

1 The Court may reverse an ALJ's decision only if it is not supported by substantial  
2 evidence or if the ALJ applied the wrong legal standard. *See Molina v. Astrue*, 674 F.3d 1104,  
3 1110 (9th Cir. 2012). Even then, the Court will reverse the ALJ's decision only if the claimant  
4 demonstrates that the ALJ's error was harmful. *Id.*

5 **A. Medical Evidence**

6 The ALJ must provide "clear and convincing reasons" to reject the uncontradicted  
7 opinion of a treating or examining doctor. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).  
8 When contradicted, a treating or examining doctor's opinion may not be rejected without  
9 "specific and legitimate reasons" that are supported by substantial evidence in the record. *Id.*  
10 Generally, the opinions of treating doctors are entitled to greater weight than the opinions of  
11 examining doctors and the opinions of examining doctors are entitled to greater weight than the  
12 opinions of non-examining doctors. *See Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

13 **1. John Yuen, M.D.**

14 Dr. Yuen, Ms. McDade's treating doctor, submitted a medical source statement in March  
15 2015. Tr. 1162-67. Dr. Yuen opined that Ms. McDade: could lift and carry up to only 10  
16 pounds occasionally; could sit for 1 hour, stand for 30 minutes and walk for 30 minutes at one  
17 time without interruption; could sit for 2 hours, stand for 1 hour and walk for 1 hour total in an 8  
18 hour workday; could reach, handle, finger, feel, push and pull occasionally; occasionally operate  
19 foot controls; occasionally climb stairs and ramps, balance, stoop, kneel, crouch but never climb  
20 ladders and scaffolds or crawl; could occasionally drive; should never be exposed to unprotected  
21 heights, moving mechanical parts, humidity and wetness, dust, odors, fumes and pulmonary  
22 irritants, extreme heat or cold, or vibrations; and should be limited to a quiet environment. *Id.*  
23 The ALJ offered several reasons for discounting Dr. Yuen's opinion including that it was

1 submitted in check-box form and failed to provide findings to support the extreme limitations  
2 offered on the form. Tr. 30.

3 “The ALJ need not accept the opinion of any physician, including a treating physician, if  
4 that opinion is brief, conclusory, and inadequately supported by clinical findings.” *Thomas v.*  
5 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). Ms. McDade acknowledges that many of the  
6 treatment notes do not address functional limitations and thus are generally of little use in  
7 measuring the accuracy of Dr. Yuen’s opinion or Ms. McDade’s functional capacity. Dkt. 9 at 7.  
8 Ms. McDade points to a couple of treatment notes in the record which she argues might offer  
9 some support Dr. Yuen’s opinion. For instance, Ms. McDade notes that she was diagnosed with  
10 fibromyalgia on several occasions and points to a couple of treatment notes from other providers  
11 in the record indicating that her strength was limited by pain and that her pain levels made it  
12 difficult to determine the cause of her low back pain. Dkt. 9 at 8 (citing Tr. 325, 481, 515, 680,  
13 688). However, the fact that Ms. McDade was diagnosed with fibromyalgia does not, in and of  
14 itself, undermine the ALJ’s reason for rejecting Dr. Yuen’s opinion. The ALJ accepted the  
15 diagnosis of fibromyalgia and included it as a severe impairment. Moreover, Dr. Yuen did not  
16 cite to any of the treatment notes highlighted by Ms. McDade or to any other findings as the  
17 basis for the significant limitations assessed in his opinion. In fact, despite the direction in the  
18 medical source statement form that Dr. Yuen “[i]dentify the particular medical or clinical  
19 findings (i.e., physical exam findings, x-ray findings, laboratory test results, history and  
20 symptoms including pain etc.) which support your assessment or any limitations and why the  
21 findings support the assessment[.]”, he offers no explanation whatsoever as to the basis for his  
22 opinions. Tr. 1162-67.

23 While Ms. McDade attempts to offer her own interpretation of the evidence by citing to

1 treatment notes from other providers which might provide some support for Dr. Yuen's opined  
2 limitations, the Court cannot say the ALJ was unreasonable in discounting Dr. Yuen's opinion as  
3 brief, conclusory and inadequately supported by clinical findings. *See Molina*, 674 F.3d at 1111  
4 ("[W]e must uphold the ALJ's findings if they are supported by inferences reasonably drawn  
5 from the record."). Accordingly, the ALJ did not err in discounting Dr. Yuen's opinion.

6 **2. Sonal Patel, M.D.**

7 Dr. Patel, Ms. McDade's treating doctor, completed a Department of Social and Health  
8 Services (DSHS) physical evaluation form in August 2013. Tr. 410-12. Dr. Patel found Ms.  
9 McDade "severely limited" meaning she was "unable to meet the demands of sedentary work."  
10 Tr. 412. Dr. Patel found that fibromyalgia, paresthesias, Hodgkin lymphoma, nodular sclerosis,  
11 interstitial lung disease and back pain all caused marked to severe limitations in Ms. McDade's  
12 ability to sit, stand, walk, lift, carry, handle, push, pull, reach, stoop and crouch. Tr. 411.

13 The ALJ discounts Dr. Patel's opinion on the grounds that she fails to explain the  
14 limitation that Ms. McDade is "severely limited" and unable to meet the demands of sedentary  
15 work, fails to provide any function-by-function limitations, and fails to provide findings  
16 supporting the extreme limitations offered. Tr. 30. The record does not support these reasons  
17 for discounting Dr. Patel's opinion. First, contrary to the ALJ's finding, Dr. Patel does assess  
18 function-by-function limitations supporting the conclusion that Ms. McDade is unable to meet  
19 the demands of sedentary work. Specifically, Dr. Patel opines that Ms. McDade's fibromyalgia,  
20 paresthesias, Hodgkin lymphoma, nodular sclerosis, interstitial lung disease and back pain all  
21 cause marked to severe limitations in her ability to sit, stand, walk, lift, carry, handle, push, pull,  
22 reach, stoop and crouch. Tr. 411. As such, this was not a valid reason to discount Dr. Patel's  
23 opinion that Ms. McDade is unable to meet the demands of sedentary work. The Court also

1 notes that the ALJ fails to address Dr. Patel's opinions as to these specific functional limitations  
2 entirely and fails to include them in the RFC or the hypothetical to the vocational expert (VE).  
3 This, in and of itself, constitutes harmful error. *See Garrison*, 759 F.3d at 1012 ("Where an ALJ  
4 does not explicitly reject a medical opinion or set forth specific, legitimate reasons for crediting  
5 one medical opinion over another, he errs."); *Molina*, 674 F.3d at 1115 (an error is harmless  
6 where it is "inconsequential to the ultimate nondisability determination" (quoting *Carmickle v.*  
7 *Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))).

8         Second, again, contrary to the ALJ's finding, Dr. Patel does provide clinical findings  
9 which tend to support the limitations offered. Specifically, Dr. Patel noted significant  
10 reductions on range of motion testing in Ms. McDade's back, neck, hips, knees, shoulders,  
11 ankles, wrists, and thumbs, and noted he even deferred testing backward extension of the hips  
12 due to pain. Tr. 413-14. The ALJ fails to mention these findings at all in addressing Dr. Patel's  
13 opinions and, while Dr. Patel might have provided a more detailed explanation for her opinions,  
14 substantial evidence does not support the ALJ's conclusion that she failed to provide any  
15 findings supporting the limitations opined.

16         The ALJ also discounts Dr. Patel's opinion on the grounds that it was completed prior to  
17 the amended alleged onset date. Tr. 30. This was also not a sufficient reason on its own to  
18 discount Dr. Patel's opinion. The ALJ is required to address all relevant evidence in determining  
19 a claimant's capacity to work. *See* 20 C.F.R. 416.945(a). It is true that often "medical opinions  
20 that predate the alleged onset of disability are of limited relevance" particularly where "disability  
21 is allegedly caused by a discrete event." *Carmickle*, 533 F.3d at 1165. However, in this case,  
22 Ms. McDade did not allege a discrete disabling event but ongoing physical impairments  
23 diagnosed prior to the amended alleged onset date including fibromyalgia, depression and status

1 post-lymphoma. Ms. McDade initially filed for SSI on September 30, 2013, alleging a disability  
2 onset date of January 1, 2011. The onset date was amended at the hearing, in response to the  
3 ALJ's inquiry, to match the SSI application date of September 30, 2013. Tr. 63. Dr. Patel's  
4 opinion was rendered in August 2013, after the original alleged onset date and merely a month  
5 prior to the amended alleged onset date. There does not appear to be any evidence that Ms.  
6 McDade's level of impairment drastically changed or improved during the month between Dr.  
7 Patel's assessment and the amended alleged onset date. Thus, the Court finds Dr. Patel's  
8 assessment was relevant and probative evidence and the ALJ could not discount the opinion  
9 solely because it was rendered one month prior to the amended alleged onset date. *See*  
10 *Thompson v. Berryhill*, No. 2017 WL 4296971 at \*3 (W.D. Wash. Sept. 28, 2017) (Noting that  
11 "[v]irtually all disability claims substantially rely on evidence predating the date the disability  
12 application is filed. This is because a claimant needs evidence of disability to apply for benefits,  
13 and that evidence necessarily involves records, statements, and opinions that predate the  
14 application.").

15 In sum, the ALJ harmfully erred in evaluating Dr. Patel's opinion which includes more  
16 significant limitations than are included in the RFC. On remand, the ALJ should re-evaluate the  
17 opinion in its entirety.

### 18 **3. Non-Examining Sources**

19 Ms. McDade contends the ALJ erred in giving great weight to the opinions of non-  
20 examining doctors Robert Handler, M.D. and Thomas Clifford, Ph.D. Dkt. 9 at 4-6. As  
21 previously noted, the opinions of treating and examining doctors are generally entitled to greater  
22 weight than the opinions of non-examining doctors. *See Garrison*, 759 F.3d at 1012. Because  
23 the Court finds the ALJ harmfully erred in evaluating Dr. Patel's treating opinion, in reevaluating

1 that opinion on remand the ALJ should also reevaluate and re-weigh the non-examining opinions  
2 of Dr. Handler and Dr. Clifford.

3 **B. Ms. McDade's Testimony**

4 The ALJ discounts Ms. McDade's testimony as "out of proportion with the medical  
5 evidence." Tr. 28. Specifically, he states that Ms. McDade "did not provide convincing details  
6 regarding factors that precipitated or aggravated the allegedly disabling symptoms, claiming that  
7 the symptoms are present 'constantly' or all of the time" and that she has "constant aches and  
8 pain 'all over' her body." *Id.* However, it is unclear how the failure to cite to precipitating or  
9 aggravating factors undermines Ms. McDade's testimony that she experiences chronic diffuse  
10 pain. Moreover, the ALJ accepts fibromyalgia as a medically determinable severe impairment  
11 and Ms. McDade's testimony appears largely consistent with the common symptoms of that  
12 impairment. *See Benecke v. Barnhart*, 379 F.3d 587, 589-90 (9th Cir. 2004) (Common  
13 symptoms of fibromyalgia include "chronic diffuse pain throughout the body, multiple tender  
14 points, fatigue, stiffness, and a pattern of sleep disturbance."). The ALJ also states that "[t]he  
15 mere fact that working may cause pain or discomfort does not mandate a finding of disability."  
16 Tr. 28. However, while this statement may be generally true, it is unclear how it undermines Ms.  
17 McDade's testimony in this case that her pain from fibromyalgia, the residual symptoms from  
18 her lymphoma/lymphoma treatment (including nausea and paresthesia), as well as her frequent  
19 migraines, prevent her from working.

20 The ALJ next states that the record reveals that treatment and medications were generally  
21 effective in controlling Ms. McDade's symptoms. Tr. 28. Specifically, the ALJ points to a  
22 treatment note from October 2013 indicating Ms. McDade's "symptoms from her fibromyalgia  
23 are better and she is seeing Dr. Yuen and is on tramadol and Lyrica." Tr. 1100. The ALJ also



1 points to a treatment note from May 2014 which indicates “[s]he certainly looks better than she  
2 did before the Lithium was started. She reports she is having more good days and the ‘dark  
3 days’ are not as bad.” Tr. 1271. “Impairments that can be controlled effectively with medication  
4 are not disabling for the purpose of determining eligibility for SSI benefits.” *Warre v. Comm’r*  
5 *of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). However, while these two treatment  
6 notes reflect that Ms. McDade had some improvement with medication, they do not show that  
7 Ms. McDade’s impairments are effectively controlled with medication.

8         While the first treatment note describes Ms. McDade’s symptoms as “better” and the  
9 second that she “looks better” and reports “more good days”, neither of the treatment notes  
10 explain what these terms mean in terms of her overall functioning. *See, e.g., Holohan v.*  
11 *Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (“[The treating physician's] statements must be  
12 read in context of the overall diagnostic picture he draws. That a person who suffers from severe  
13 panic attacks, anxiety, and depression makes some improvement does not mean that the person’s  
14 impairments no longer seriously affect her ability to function in a workplace.”). The treatment  
15 notes offer no explanation as to how or whether this improvement was drastic or minimal,  
16 whether it increased Ms. McDade’s functional capacity to any extent, or whether the  
17 improvement was sustained such that her impairments could be considered “controlled  
18 effectively.” *Warre*, 439 F.3d at 1006; *Hutsell v. Massanari*, 259 F.3d 707, 712 (8th Cir. 2001)  
19 (“We also believe that the Commissioner erroneously relied too heavily on indications in the  
20 medical record that Hutsell was ‘doing well,’ because doing well for the purposes of a treatment  
21 program has no necessary relation to a claimant’s ability to work or to her work-related  
22 functional capacity.”). Moreover, the Social Security Administration Rulings (SSRs) recognize  
23 that the longitudinal record is particularly important in fibromyalgia cases “because the

1 symptoms of [fibromyalgia] can wax and wane so that a person may have ‘bad days and good  
2 days.’” SSR 12-2p, 2012 WL 3104869, at \*6. Here, the subsequent treatment records do not  
3 appear to reflect continued improvement of symptoms but, rather, generally reflect ongoing  
4 complaints of pain, stiffness and fatigue. Accordingly, substantial evidence does not support this  
5 reason for discounting Ms. McDade’s testimony.

6 The ALJ also notes that “despite her complaints, the physical examination was within  
7 normal limits other than reported tenderness in the hands, shoulders and knees and 8/18  
8 fibromyalgia tender points.” Tr. 28. However, to the extent the ALJ intends to rely upon this  
9 finding, it does not, in fact, undermine Ms. McDade’s pain testimony and reflects a  
10 misunderstanding of the nature of fibromyalgia. “Fibromyalgia is a disease notable for its lack  
11 of usual outward signs.” *Neisinger v. Colvin*, No. 2016 WL 2866260, at \*4 (W.D. Wash. May  
12 17, 2016). As the Ninth Circuit has held, an ALJ errs in “effectively requiring ‘objective’  
13 evidence for a disease that eludes such measurement.” *Benecke*, 379 F.3d at 590 (quoting  
14 *Green-Younger v. Barnhart*, 335 F.3d 99, 108 (9th Cir. 2003)).

15 The ALJ also notes that Ms. McDade completed chemotherapy for her lymphoma and  
16 that the cancer “completely resolved” in February 2013. Tr. 28. However, Ms. McDade does  
17 not dispute this in her testimony or claim she still has cancer. Rather, she claims that she has  
18 ongoing symptoms, including paresthesia and nausea as a result of her lymphoma/lymphoma  
19 treatment. Thus, this evidence does not undermine Ms. McDade’s testimony. The ALJ also  
20 finds that psychiatric examinations since the amended alleged onset date have been within  
21 normal limits. Tr. 28 (citing 1059, 1063, 1073, 1080, 1097, 1099-1100, 1171-1283). However,  
22 the record does not support this finding. The majority of the “psychiatric examinations” the ALJ  
23 points to are merely cursory observations made by providers during the course of appointments

1 intended to address Ms. McDade's physical impairments and symptoms rather than her mental  
2 health symptoms. Furthermore, contrary to the ALJ's finding, psychiatric assessments by Ms.  
3 McDade's mental health counselor since the amended alleged onset date regularly indicate that  
4 Ms. McDade presented with dysthymic or depressed mood and restricted affect and frequently as  
5 tearful or irritable or fluctuating between the two. *See generally* Tr. 1176-1258. The ALJ also  
6 accepted depression as a medically determinable impairment that has more than a minimal  
7 impact on Ms. McDade's ability to function. Ms. McDade's testimony and statements focus  
8 primarily on her limitations caused by pain from fibromyalgia, migraine headaches, and  
9 symptoms from lymphoma/lymphoma treatment. While Ms. McDade does state that she has  
10 struggled with depression which causes strain she states she has been "dealing with it" and  
11 "working on it" in therapy. Tr. 52. Ms. McDade does not appear to allege that her depression is  
12 so severe or enduring that, in and of itself, it is debilitating. Accordingly, substantial evidence  
13 does not support the ALJ's finding that Ms. McDade's testimony regarding her mental health is  
14 inconsistent with the medical record.

15         The ALJ also discounts Ms. McDade's testimony as inconsistent with her daily activities.  
16 Tr. 28-29. Specifically, the ALJ cites to Ms. McDade's ability to perform her own personal care  
17 and basic activities of daily living, cook/prepare meals, do light household cleaning, do laundry,  
18 go shopping, and manage her finances, watch movies/television, socialized with her daughter  
19 and cousin, walk in the pool for exercise, and attend AA meetings 4-5 times a week including  
20 chairing the meetings and unlocking the church doors once per week. *Id.* However, the ALJ  
21 fails to identify what aspects of Ms. McDade's testimony conflict with these rather basic  
22 activities. Thus, the ALJ's findings were not sufficiently specific or clear to discount Ms.  
23 McDade's testimony. *Lester*, 81 F.3d at 834 ("General findings are insufficient; rather, the ALJ

1 must identify what testimony is not credible and what evidence undermines the claimant's  
2 complaints.”). Moreover, the fact that Ms. McDade was able to perform some limited basic  
3 activities does not undermine her testimony. *See Smolen v. Chater*, 80 F.3d 1273, 1287 n. 7 (9th  
4 Cir. 1996) (“The Social Security Act does not require that claimants be utterly incapacitated to  
5 be eligible for benefits, and many home activities may not be easily transferable to a work  
6 environment where it might be impossible to rest periodically or take medication.” (citation  
7 omitted)).

8       Furthermore, the activities the ALJ identifies were performed for short periods of time  
9 and Ms. McDade testified she was more limited in many of these activities than the ALJ  
10 acknowledges. In fact, Ms. McDade indicated that as her symptoms had worsened she was  
11 unable to perform many of the activities cited by the ALJ at all anymore. *See* SSR 12-2p, 2012  
12 WL 3104869, at \*6 (the longitudinal record is important in fibromyalgia cases because the  
13 symptoms of fibromyalgia can wax and wane). For instance, Ms. McDade testified at the 2015  
14 hearing that she was no longer able to act as chair at the AA meetings and was only able to  
15 attend 1-2 times per week, that she could no longer cook because she could not stand for  
16 significant periods of time, and her daughter had to help her around the house. Tr. 48-49.  
17 Finally, none of these rather limited, primarily in-home activities, cited by the ALJ establish that  
18 Ms. McDade could perform basic work activities on a regular and continuing basis in a work  
19 setting. There is no evidence Ms. McDade spent a substantial part of her day performing any of  
20 these activities or that the level at which she performed them is transferable to the work setting.  
21 *Cf. Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (Daily activities may also be grounds for an  
22 adverse credibility finding “if a claimant is able to spend a substantial part of his day engaged in  
23

1 pursuits involving the performance of physical functions that are transferable to a work  
2 setting.”).

3 The ALJ also noted that Ms. McDade had a history of substance abuse including two  
4 DUIs and mandatory substance abuse treatment. Tr. 29. However, there is no evidence that Ms.  
5 McDade was abusing alcohol or other substances during the period in question or that she made  
6 inconsistent statements regarding her substance abuse, nor does the ALJ make such findings. *Cf.*  
7 *Thomas*, 278 F.3d at 959 (upholding a credibility determination where the claimant “present[ed]  
8 conflicting information about her drug and alcohol use”). The ALJ fails to explain how the  
9 evidence of past substance abuse undermines Ms. McDade’s testimony. Accordingly, on its  
10 own, this was not a clear and convincing reason to discount Ms. McDade’s testimony. *See, e.g.,*  
11 *Woodsum v. Astrue*, 711 F.Supp.2d 1239, 1262 (W.D. Wash. May 7, 2010) (“[D]iscounting  
12 plaintiff’s credibility because of her substance abuse and legal history was improper, given that it  
13 bears little relevance to the plaintiff’s tendency to tell the truth.”).

14 The ALJ also discounts Ms. McDade’s testimony based on her “poor work history.” Tr.  
15 29. While there may be situations where an “extremely poor work history” and demonstrated  
16 “little propensity to work” in one’s lifetime could negatively affect one’s credibility regarding  
17 the inability to work, substantial evidence does not support this as a basis to discount Ms.  
18 McDade’s testimony in this case. *Thomas*, 278 F.3d 947. While Ms. McDade had low earnings  
19 between 1990 and 1998 (between the ages of 17 and 25), she had significant earnings from 1999  
20 to 2003. Furthermore, Ms. McDade explained that she was terminated from her job in 2003 due  
21 to a change in management and conflict over mileage in commuting. Tr. 43-44. She testified  
22 that when she was unable to find another job she worked as a caretaker for her grandmother  
23 when she became ill and subsequently began experiencing health problems herself. *Id.* While

1 Ms. McDade may not have the most extensive work history the evidence does not support a  
2 finding that she had “little propensity” to work such that it undermines her testimony.

3 The ALJ also discounts Ms. McDade’s testimony based on alleged inconsistent  
4 statements. Tr. 29. Substantial evidence does not support this finding. Specifically, the ALJ  
5 indicates that Ms. McDade gave differing reasons for stopping work. Tr. 29. The ALJ points  
6 out that in August 2014 Ms. McDade reported she stopped working because she “mentally  
7 snapped”<sup>4</sup>, but also that a conflict with her employer over paying her mileage led to her  
8 termination. *Id.* The Court does not find this to be a meaningful inconsistency. It is unclear  
9 what Ms. McDade meant by “mentally snapped” and the ALJ did not inquire. It may be that the  
10 stress over the conflict with her employer caused her mental distress and contributed to her  
11 termination. Without further development substantial evidence does not support the ALJ’s  
12 finding of inconsistency. The ALJ also states that Ms. McDade testified at the April 2015  
13 hearing that she stopped working to care for her grandmother. Tr. 29. However, Ms. McDade’s  
14 attorney, not the claimant herself, made that assertion in his opening statement to the ALJ and  
15 Ms. McDade clarified when asked that she had stopped working because she was terminated as  
16 described above and that she had subsequently started caring for her grandmother. Tr. 43-44.  
17 Again, the Court does not find this to be a meaningful inconsistency such that it undermines Ms.  
18 McDade’s entire testimony.

19 The ALJ also notes that Ms. McDade alleged having headaches 3-4 days a week lasting  
20 1-2 days but that “the medical evidence of record did not reflect headaches of this frequency or

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21 <sup>4</sup> The ALJ also notes that there are “no mental health records” from the time that Ms. McDade claimed  
22 she “mentally snapped.” Tr. 29. This also does not undermine Ms. McDade’s testimony. Ms. McDade  
23 did not allege disability based on her mental status in 2003 and, as such, it is unclear why medical records  
would be required from that period of time. Furthermore, the ALJ did not ask what Ms. McDade meant  
in stating she “mentally snapped” and thus it is not clear whether mental health records for that period of  
time would be at all relevant.

1 duration.” Tr. 29. This was not a sufficient reason on its own to discount Ms. McDade’s  
2 testimony. The ALJ found migraines to be a severe impairment and thus he could not discount  
3 Ms. McDade’s testimony solely because it was not fully supported by the medical evidence of  
4 record. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (“[O]nce the claimant produces  
5 objective medical evidence of an underlying impairment, an adjudicator may not reject a  
6 claimant's subjective complaints based solely on a lack of objective medical evidence to fully  
7 corroborate the alleged severity of pain.”). Furthermore, the record reflects that in January 2011,  
8 Ms. McDade reported having headaches 3-4 times a week with 2-3 being migraines, that she  
9 began having headaches on a daily basis when she started chemotherapy, and in October 2013  
10 she reported using ibuprofen for headaches about 10 times per month. Tr. 573, 1047, 1098. The  
11 most recent treatment notes also indicate that Ms. McDade continued to use prescription  
12 medications for her migraines. Tr. 1188, 1200, 1212. Thus, substantial evidence does not  
13 support this reason for discounting Ms. McDade’s testimony.

14 The ALJ also notes that at the April 2015 hearing, Ms. McDade testified “she had 10  
15 migraines a month, but admitted she had not had one in 2-3 weeks thanks to medication.” Tr. 29.  
16 However, the ALJ misstates Ms. McDade’s testimony. She in fact testified that she *has* “gotten  
17 migraines like ten times in one month” but stated at that, at the time of the hearing, she hadn’t  
18 had a migraine in maybe two and a half, three weeks. Tr. 47. She also stated separately that she  
19 took medication for her migraines but did not attribute the fact that she had not had a migraine  
20 for a few weeks to her medication which she appears to have been using for some time. *Id.* The  
21 Court finds no substantial or significant inconsistency in these statements. The ALJ also notes  
22 that some providers noted Ms. McDade’s depressive symptoms were situational, beginning when  
23 she was diagnosed with cancer but that Ms. McDade “attributes the onset of her depression to the

1 death of her mother and relationship issues prior to her mother's death" in 2013. Tr. 29. Again,  
2 the Court does not find this to be a substantial or significant inconsistency. The fact that Ms.  
3 McDade may attribute the source of her depression to other or additional causes than some of her  
4 providers does not substantially undermine her testimony. Unlike a broken limb or other  
5 traumatic physical injury the causes of a mental health impairment such as depression may be  
6 multiple or difficult to pinpoint. The Court does not find this to be a substantial inconsistency  
7 which undermines Ms. McDade's testimony.

8 Finally, the ALJ discounted Ms. McDade's testimony on the grounds that "at the hearing,  
9 [she] claimed there were additional/recent cancer treatment records from PMC, indicating she  
10 was still receiving treatment for cancer" but then stated "she was unable to obtain those records."  
11 Tr. 29. The ALJ finds this to be a "false" statement because Ms. McDade's cancer completely  
12 resolved and was in remission in February 2013. Tr. 29-30. The record does not appear to  
13 support this finding. Ms. McDade's attorney represented to the ALJ at the hearing that he was  
14 still waiting on medical evidence from Pacific Medical and requested an additional week to  
15 submit that evidence. Tr. 40-41. There is no indication in the transcript that a representation was  
16 made that the evidence related to continued cancer treatment and Ms. McDade herself  
17 acknowledged having completed chemotherapy and that she was in remission. Tr. 45-46.  
18 Moreover, Ms. McDade's attorney represents that he submitted the additional evidence  
19 following the hearing and the ALJ considered that evidence in rendering his decision. Dkt. 9 at  
20 15; Tr. 1171-1283. The Commissioner, in response, does not dispute counsel's representation.  
21 Accordingly, substantial evidence does not support this reason for discounting Ms. McDade's  
22 testimony.



1 In sum, the ALJ erred in discounting Ms. McDade's testimony.<sup>5</sup> This error was harmful  
2 because Ms. McDade alleges greater limitations than the ALJ includes in the RFC or in the  
3 hypotheticals to the VE. On remand, the ALJ should reevaluate Ms. McDade's testimony.

4 **C. Lay Opinion Evidence**

5 Lay testimony as to a claimant's symptoms or how an impairment affects the claimant's  
6 ability to work is competent evidence that the ALJ must take into account. *Nguyen v. Chater*,  
7 100 F.3d 1462, 1467 (9th Cir. 1996). In order to discount competent lay witness testimony, the  
8 ALJ "must give reasons that are germane to each witness." *Dodrill v. Shalala*, 12 F.3d 915, 919  
9 (9th Cir. 1993).

10 **1. Jacqueline Lindsey**

11 Ms. Lindsey, Ms. McDade's cousin, submitted a Third Party Function Report in October  
12 2013. Tr. 220-27. Ms. Lindsey identifies many of the same limitations Ms. McDade testified to.  
13 Ms. Lindsey stated that Ms. McDade took a long time to get ready in the morning, could not sit  
14 or stand for long periods of time, and was not driving at the time. *Id.* She indicated she helped  
15 Ms. McDade with housework, that Ms. McDade could make simple meals if she was feeling  
16 good but that otherwise her daughter cooked. *Id.* She stated that Ms. McDade might spend an  
17 hour working on light chores a couple times a week but that she sometimes needed assistance  
18 with those chores. *Id.*

19 In discounting Ms. Lindsey's statement the ALJ states that Ms. Lindsey "simply

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20 <sup>5</sup> The Commissioner asserts several other reasons for discounting Ms. McDade's testimony including that  
21 she only received conservative treatment, unexplained or inadequately explained failure to follow a  
22 prescribed course of treatment, and the inconsistent opinions of reviewing doctors. Dkt. 10 at 4-8.  
23 However, although the ALJ mentions some of the evidence cited by the Commissioner in his opinion, he  
does not rely on that evidence as a basis for discounting Ms. McDade's testimony as the Commissioner  
suggests. As such, the Commissioner's arguments constitute post-hoc rationalizations which the Court  
cannot rely upon in order to affirm the ALJ's decision. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d  
1219, 1225 (9th Cir. 2009).

1 reiterates” Ms. McDade’s subjective allegations. Tr. 31. To the extent the ALJ intends to  
2 discount Ms. Lindsey’s statements for the same reasons he discounted Ms. McDade’s testimony,  
3 this reason fails. As noted above, the ALJ erred in evaluating Ms. McDade’s testimony and the  
4 same insufficient reasons proffered to discount Ms. McDade’s testimony are also not germane  
5 reasons for discounting Ms. Lindsey’s testimony. *Cf. Valentine v. Comm’r Soc. Sec. Admin.*, 574  
6 F.3d 685, 694 (9th Cir. 2009) (Where an ALJ has provided clear and convincing reasons for  
7 finding a claimant not fully credible, those reasons are germane reasons for rejecting similar lay  
8 witness testimony.). The ALJ also states that some of Ms. Lindsey’s statements “confirm certain  
9 abilities and activities by the claimant (e.g., ability to engage in basic activities of daily living,  
10 interact appropriately with others) which provides support for the residual functional capacity  
11 conclusion[.]” Tr. 31. The ALJ’s reasoning here is rather unclear. To the extent the ALJ  
12 intends to discount Ms. Lindsey’s statements as internally inconsistent he fails to, in fact,  
13 identify any specific inconsistencies. To the extent the ALJ intends to discount these statements  
14 as inconsistent with Ms. McDade’s activities, as discussed in detail above, the basic activities  
15 cited by the ALJ are not sufficient to discount Ms. McDade’s testimony nor do they undermine  
16 Ms. Lindsey’s testimony.

17 The ALJ also discounts Ms. Lindsey’s testimony noting she is not a medical professional  
18 and the limitations she alleged were not entirely consistent with the clinical observations of  
19 medical professionals. Tr. 31. The fact that Ms. Lindsey is not a medical professional is not a  
20 germane reason to discount her lay testimony. Furthermore, the ALJ fails to identify which  
21 medical professionals’ clinical observations he finds inconsistent with Ms. Lindsey’s statements.  
22 Moreover, as discussed above, the ALJ erred in evaluating some of the medical evidence which  
23 must be reevaluated on remand. As such, this also does not constitute a germane reason for

1 discounting Ms. Lindsey's statements. This error was not harmless as Ms. Lindsey testified to  
2 more severe limitations than the ALJ included in the RFC or in the hypothetical to the VE.

3 On remand, the ALJ should reevaluate Ms. Lindsey's lay statement.

4 **2. Kasha Martin**

5 Kasha Martin, Ms. McDade's daughter, also testified at the April 2015 hearing. Tr. 53-  
6 57. Ms. Martin reiterated much of Ms. McDade's testimony at the hearing. *Id.* Ms. Martin  
7 testified that she had to help Ms. McDade with every-day tasks around the house such as  
8 cooking, laundry and grocery shopping, that her mother mostly lay down during the day and had  
9 trouble getting around physically. *Id.* She testified that she had taken time off of school to help  
10 Ms. McDade due to her health issues and that her mother would "definitely not" be able to work  
11 full-time. *Id.*

12 The ALJ erred in failing to address Ms. Martin's testimony entirely. *See Nguyen*, 100  
13 F.3d at 1467; *Dodrill*, 12 F.3d at 919. The Commissioner contends the error is harmless because  
14 Ms. Martin reiterated much of Ms. McDade's testimony which the ALJ discounted. Dkt. 10 at  
15 18. However, as noted above, the ALJ erred in evaluating Ms. McDade's testimony and, as  
16 such, the same insufficient reasons proffered to discount Ms. McDade's testimony are also not  
17 germane reasons for discounting Ms. Lindsey's testimony. *Cf. Valentine*, 574 F.3d at 694. Ms.  
18 Martin also testified to more severe limitations than the ALJ included in the RFC or in the  
19 hypothetical to the VE. Accordingly, the ALJ's error in failing to address Ms. Martin's lay  
20 statement was not harmless. On remand, the ALJ should reevaluate Ms. Martin's statement.

21 **D. Scope of Remand**

22 Ms. McDade requests that this matter be reversed and remanded for further  
23 administrative proceedings. Dkt. 9 at 1. In general, the Court has "discretion to remand for

1 further proceedings or to award benefits.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).  
2 The Court agrees that as there is conflicting medical evidence and not all essential factual issues  
3 have been resolved, that remand for further administrative proceedings is appropriate. *Treichler*  
4 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014) (“Where there is conflicting  
5 evidence, and not all essential factual issues have been resolved, a remand for an award of  
6 benefits is inappropriate.”).

## 7 V. CONCLUSION

8 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this  
9 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §  
10 405(g).

11 On remand, the ALJ should reevaluate Dr. Patel’s opinion, the non-examining doctor’s  
12 opinions, Ms. McDade’s testimony, and the lay witness statements. Upon reevaluating the  
13 evidence, the ALJ should also reassess and re-determine the RFC and proceed with steps four  
14 and five of the sequential review process with the assistance of VE testimony as necessary.

15  
16 DATED this 20 day of November 2017.

17 

18 RICARDO S. MARTINEZ  
19 CHIEF UNITED STATES DISTRICT JUDGE  
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